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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 809

JULIA RHODA AARON, ETC., ET AL., PETITIONERS

v.

FORD, BACON AND DAVIS, INCORPORATED

No. 836

R. M. POWELL, ET AL., PETITIONERS

v.

THE UNITED STATES CARTRIDGE COMPANY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States respectfully requests the Court to grant the petitions for certiorari in the above

cases. The cases involve suits by employees of Government cost-plus contractors for overtime compensation claimed to be due under the Fair Labor Standards Act, and are similar to *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, which this Court last term remanded to the district court, without ruling on the merits, "for reconsideration and amplification of the record," and to *Creel v. Lone Star Defense Corporation*, No. 746, this Term, certiorari granted June 6, 1949. The *Powell* case, however, unlike the *Silas Mason* case, was not disposed of in a summary judgment proceeding, but was decided after a full trial of the merits. Subsequent to this Court's decision in the *Silas Mason* case, the Court of Appeals set the instant cases for reargument, pointing out that the issues presented here were the same as those involved in the *Silas Mason* case, and that while the *Silas Mason* case had been remanded because the record was "not sufficiently complete," in the *Powell* case there had been a full trial and the record "would seem to be sufficient to warrant the consideration of the question as to the applicability, if any, of the above enumerated acts of Congress."

The district court, in the *Powell* case, after trial and findings of fact, ruled that defendant was engaged in production of goods for commerce within the scope of the Act and that it was the employer of the plaintiffs within the meaning of the Fair Labor Standards Act. (R. 916-920.) The Court of Appeals reversed this judgment on the wholly novel ground

that the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U. S. C. 35) and the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. 201) are mutually exclusive and that only the Walsh-Healey Act is applicable here. Holding that the employees could not maintain the suit under the Walsh-Healey Act, the Court of Appeals ordered the action dismissed. In the *Ford, Bacon and Davis* case, the district court had granted judgment for the defendant, and this decision was affirmed by the Court of Appeals.

These cases involve the same questions which this Court in the *Silas Mason* case characterized as "extremely important" (334 U. S. at 256), and as to which certiorari was granted in the *Lone Star* case. And the new point, upon which the court below rested its decision, is of even greater consequence to the administration of the Fair Labor Standards Act. For the holding that contractors covered by the Walsh-Healey Act are thereby exempt from the Fair Labor Standards Act applies not only to cost-plus war contractors, but apparently to all peacetime contractors with the Government as well.

We believe that the decision below that contractors subject to the Walsh-Healey Act are not covered by the Fair Labor Standards Act is contrary to the clear legislative intent and to the consistent construction of these statutes throughout the more than ten years of their existence, not only by the Administrator, but by the courts, and indeed

by all government agencies concerned.[1] This is illustrated by the explicit notice to employees in the instant cases that they would be paid in accordance with the Fair Labor Standards Act *and* the Walsh-Healey Act. (See opinion below, pp. 8-9). There is also a conflict between this decision and the decision of the Sixth Circuit in *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, which held the Fair Labor Standards Act applicable to government contractors as against an argument based on the Eight Hour Law similar to that accepted by the court below with respect to the Walsh-Healey Act.

1. While the coverage of the Fair Labor Standards Act and the Walsh-Healey Act may overlap, there is nothing inconsistent in the application of both statutes, where both are applicable by their terms. There is nothing in either statute "which provides for exclusiveness of remedy" or "for an election of remedies." Cf. *Brooks* v. *United States*, Nos. 388 and 389—October Term, 1948, decided May 16, 1949. On the contrary, "the language, framework and legislative history" (*ibid.*) require the conclusion that the acts were not intended to be mutually exclusive but rather mutually reenforcing.

The fact that the two acts would overlap in certain circumstances was appreciated from the outset. Prior to the enactment of the Fair Labor Standards Act, the Secretary of Labor drew the

[1] The absence of other litigation on this point indicates that this has been the general understanding of employers as well.

attention of Congress to the fact that the bill (Fair Labor Standards) "overlaps to some extent the administrative functions performed with respect to Government contracts under the Walsh-Healey Act" (81 Cong. Rec. Appendix 1484, 75th Cong., 1st sess., June 15, 1937). The Secretary recommended that the Walsh-Healey Act nevertheless "should be continued in full force and effect" for the reason, but obviously only for the reason, of taking advantage of the Walsh-Healey Act to the extent that it covered certain businesses which it was thought could not constitutionally be regulated under the commerce power (e. g., it might be applied to "certain distributive concerns engaged in intrastate business"), and to the extent that its labor standards might in some cases be higher (*ibid.*).

There was clearly no intent and no suggestion was ever made that the retention of the Walsh-Healey Act would operate to exclude employees working under Government contract from the broader coverage and the more effective remedies provided in the Fair Labor Standards Act. On the contrary, an affirmative measure was incorporated in Section 18 of the Act to insure against any such result. Section 18 provides that nothing in the Act "shall excuse noncompliance with any Federal or State law or municipal ordinance establishing * * * a higher standard than the standard established under this Act;" this would clearly seem to cover the Walsh-Healey Act. Furthermore, Congress

was very explicit when it wished to exclude employees from the Fair Labor Standards Act because they were regulated by other possibly overlapping Federal statutes. See Section 13(a)(4) exempting employees subject to regulation under the Railway Labor Act, and Section 13(b)(1) and (2) exempting employees subject to regulation by the Interstate Commerce Commission. These factors together show that there was no intent to exempt employees because they might be subject to the Walsh-Healey Act.

Since the original enactment of the Fair Labor Standards Act, Congress has frequently recognized that both Acts were applicable to Government cost-plus contracts. Each annual report since 1942 has expressly brought to the attention of the Congress the Administrator's view that most employers subject to the Public Contracts Act are also subject to the Fair Labor Standards Act, as well,[2] and detailed schedules of the Administrator's inspection activities showing the enforcement of that view.[3] The reports also show that in a number of cases administrative proceedings under the Walsh-Healey Act have been accompanied by criminal prosecutions under Section 16(a) of the Fair Labor Standards

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[2] 1943 Annual Report, p. 9; 1944 Annual Report, p. 10; 1945 Annual Report, p. 2; 1946 Annual Report, p. 14; 1948 Annual Report, p. 5.

[3] 1943 Annual Report, p. 2; 1944 Annual Report, p. 37; 1945 Annual Report, p. 17; 1946 Annual Report, pp. 18, 20; 1947 Annual Report, p. 69; 1948 Annual Report, p. 31.

Act.[4] On the basis of these reports Congress each year has voted appropriations for such enforcement without the slightest hint of criticism that the money was being expended in enforcement activities not contemplated in the basic statutes. In analogous situations such action has been held to constitute Congressional confirmation and ratification of an administrative interpretation of long-standing and consistent application. *Brooks* v. *Dewar,* 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.,* 331 U. S. 111, 116; see also *Wells* v. *Nickles,* 104 U. S. 444, 447; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147.

In addition, the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C. (1946 ed., Supp. I) § 251) shows that Congress believed that the Fair Labor Standards Act applied to government contractors. One of the stated purposes of the Portal Act was to invalidate portal-to-portal claims by employees under the Fair Labor Standards Act because of the "increased cost of war contracts" by virtue of liabilities to cost-plus contractors from such claims. This statement would have been meaningless if all government contractors were exempt from the Act, as would be true if all persons covered by the Walsh-Healey Act were exempt.

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[4] See Administrator's Annual Report for 1948, p. 9. The records of the United States District Courts show at least 20 criminal cases in which defendants had been convicted and fined for violations under the Fair Labor Standards Act where those same defendants were found liable in administrative proceedings under the Walsh-Healey Act.

2. That both statutes may apply to employees of Government contractors has been the consistent administrative construction of these statutes throughout the more than ten years of their existence, by the Department of Justice and by the Wage and Hour Administrator. In 1942 the Secretary of War was apparently of the same opinion. And it is to be observed that in the *Silas Mason* case the Department of the Army did not suggest even the possibility of a defense based upon the Walsh-Healey Act. See also opinion of the Comptroller General dated September 28, 1942, 22 Comp. Gen. Decisions 277. The statement in the opinion below that the two Acts could not apply at one and the same time without "attending confusion in computing wages and the collection of claims therefor" (op., p. 14) is simply not borne out by the more than ten years' experience in the practical administration and enforcement of these acts.

CONCLUSION

For the above reasons, the Government submits that the petitions for writs of certiorari should be granted, and the cases set down for argument with *Creel v. Lone Star Defense Corporation*, No. 746, certiorari granted, June 6, 1949.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

WILLIAM S. TYSON,
Solicitor of Labor.

JUNE, 1949.

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